ATICO OVERSEAS LTD

v.

PROCAST FURNITURE INDUSTRY SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
HAMID SULTAN ABU BACKER J
[SUIT NO: D5-22-215-2008]
5 JANUARY 2012

CONTRACT: *Breach - Sale of goods - Goods delivered were defective and of unmerchantable quality - Whether breach of express and implied terms of agreement - Whether defendant liable for losses suffered by plaintiff*

JURISDICTION: *Forum for trial - Governing law - Agreement that Hong Kong law to be governing law - Whether Malaysian court had jurisdiction to hear matter - Proof of foreign law - Whether raw evidence could be adduced - Evidence Act 1950, ss. 38, 78(2), 84 & 86*

The defendant entered into two agreements with the plaintiff for the sale of which goods were to be delivered to an end purchaser in England. It was subsequently discovered that the said goods were defective and of unmerchantable quality resulting in the plaintiff having to compensate the end purchaser and incur additional costs of disposing the defective goods on behalf of the defendant. It was the plaintiff's case that the defendant was in breach of the express and/or implied terms of the agreements and therefore claimed against the defendant for the goods purchased which were defective subject to the Hong Kong Sale of Goods Ordinance.

Held (allowing plaintiff's claim with costs):

(1) The goods purchased were subject to the terms and conditions contained in the plaintiff's purchase orders. The plaintiff in the present case had established their case according to the law and the defendant was required to indemnify the plaintiff as per the terms and conditions of the purchase orders. In any event, the defendant's defence was more of a bare denial which did not reflect the contemporaneous documents between the plaintiff and the defendant on the issue of liability as well as quantum.

(2) On the facts, the plaintiff and the defendant agreed that the governing law to the purchase orders would be the law of Hong Kong. Nevertheless on the factual matrix of the case this court had jurisdiction to hear the matter. (*Kuwait Airways Corp v. Iraqi Airways*; foll, *Government of India v. Cairn Energy India Pty Ltd;* foll). Further, on the issue of proof of foreign law, the Act or Ordinance can be directly adduced as 'raw evidence' as stated in ss. 38, 78(2), 84 and 86 of the Evidence Act 1950.

(3) Based on the facts, the issues to be tried were found in favour of the plaintiff and there was no merit in the defendant's case.

Case(s) referred to:

Bowskill v. Dawson And Anor [1953] QBD 1393 ***(refd)***

Government of India v. Cairn Energy India Pty Ltd [2012] 3 CLJ 423 FC ***(foll)***

Guan Soon Tin Mining Company v. Wong Fook Kum [1968]1 LNS 43 FC ***(refd)***

In The Goods of Goh Siew Swee, deceased, Goh Tat Eng v. Goh Eng Loon [1911] 12 SSLR 18 ***(refd)***

Kaljiban Bhattacherjee Cr LJ 775 ***(refd)***

Kuwait Airways Corp v. Iraqi Airways [2002] 2 AC 883 ***(foll)***

Mak Sik Kwong v. Minister of Home Affairs, Malaysia (No 2) [1975] 1 LNS 97 HC ***(refd)***

Mohd Nazari Ab Majit v. Tan Keo Hock & Anor [1999] 1 CLJ 601 HC ***(refd)***

Oriental Fiannce Bhd v. Emas Kejuruteraan Sdn Bhd & Ors [2002] 7 CLJ 449 HC ***(refd)***

Pacific Recreation Pte Ltd v. SY Technology Inc [2008] 2 SLR 491 ***(refd)***

PP v. Datuk Haji Harun Haji Idris & Ors [1977] 1 LNS 92 HC ***(refd)***

Recaliva Design Steel (M) Sdn Bhd v. Vista Access Sdn Bhd & Anor [2008] 10 CLJ 491 HC ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 38, 45, 78(2), (6), 84, 86

For the plaintiff - Aaron Mathews; M/s Shook Lin & Bok
For the defendant - K Pasupathi; M/s Murphy & Dunbar

Reported by S Barathi

JUDGMENT

Hamid Sultan Abu Backer J:

[1] This is my judgment in respect of the plaintiff's claim for loss and damage against the defendant for goods purchased which were defective subject to Hong Kong Sale of Goods Ordinance and the terms of purchase. The prayer in the statement of claim *inter alia* reads as follows:

(a) The sum of USD122,091.45;

(b) General damages;

(c) Interest at such rate and from such period as this Honourable Court deems just and expedient, pursuant to Section 11 of the Civil Law Act 1956;

(d) Interest at the rate of 8% per annum from the date of judgment to the date of full and final settlement and costs etc.

[2] It is essential to note there were various correspondences on the plaintiff's side to the defendant on the issue of liability and quantum of claim. There was no material objection orally or in writing at the material time to the claim as advocated by the defendant's witness in evidence and in fact there is admission to liability as well as quantum, subject to terms which have not been materialised.

[3] The parties have relied on the following cases: *Kuwait Airways Corp v. Iraqi Airways* [2002] 2 AC 883; *The Government of India v. Cairn Energy India Pty Ltd* [2012] 3 CLJ 423; *Pacific Recreation Pte Ltd v. SY Technology Inc* [2008] 2 SLR 491; *Recaliva Design Steel (M) Sdn Bhd v. Vista Access Sdn Bhd & Anor* [2008] 10 CLJ 491; *Atico International (HK) Ltd v. Sparko (Far East) Ltd* [2006 HKEC] 2118; *Oriental Fianance Bhd v. Emas Kejuruteraan Sdn Bhd & Ors* [2002] 7 CLJ 449; *Guan Soon Tin Mining Company v. Wong Fook Kum* [1968] 1 LNS 43; *PP v. Datuk Haji Harun Haji Idris & Ors* [1977] 1 LNS 92; *Bowskill v. Dawson And Anor* [1953] QBD 1393; *Mohd Nazri Ab Majit v. Tan Keo Hock & Anor* [1999] 1 CLJ 601.

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Brief Facts

[4] The plaintiff is a trading company inclusive of furniture located in Hong Kong. The Malaysian representative of the plaintiff was its sister company incorporated under the name of
B New Atico Trading Sdn Bhd (NAT) whose manager gave evidence on behalf of the plaintiff. The plaintiff's case has been set out in encl. 14 and it can be summarised as follows:

(a) The defendant entered into two agreements with the plaintiff, namely Purchase Order No. 51019001-1 dated 21.10.2005
C and Purchase Order No. 51019002-1 dated 9.1.2006 (the sale and purchase agreements), to sell 4,277 pieces of side by side garden seats and 4,224 sets of garden tiles (the said goods) for USD 115,479.00 and USD30,412.80 respectively.

D (b) It was agreed that the said goods were to be delivered to an end purchaser in England, Wilkinson Hardware Stores Ltd (Wilkinson). The plaintiff paid for the said goods and defendant delivered the said goods to Wilkinson in batches.

(c) It was subsequently discovered that the said goods were
E defective and of unmerchantable quality in that they were:

(i) tainted with mould;

(ii) of inconsistent timber quality;

(iii) of inconsistent product colour finishing; and
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(iv) of unacceptable levels of use of timber with splits in it.

(d) It is the plaintiff's case that the defendant is in breach of the express and/or implied terms of the sale and purchase agreements in that the said goods were not;
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(i) free of defects;

(ii) of merchantable quality; and/or

(iii) fit for purpose
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(the said breaches).

(e) It is the plaintiff's case that as a result of the aforesaid breaches, Wilkinson was forced to recall all the said goods. This resulted in the plaintiff having to pay compensation to
I Wilkinson to the sum of USD111,600.94. In addition the plaintiff incurred additional costs of USD10,490.51 to dispose of the defective goods on behalf of the defendant.

(f) By way of a letter of demand dated 15.6.2007, the plaintiff through its solicitors Messrs Shook Lin & Bok demanded that the defendant indemnify the plaintiff to the sum of USD122,091.45 (as per the sale and purchase agreements) within the time frame stipulated therein. The defendant failed, neglected and/or refused to reply and comply with the plaintiff's demand.

[5] The defendant's defence was more of a bare denial which did not reflect the contemporaneous documents between the plaintiff's side and the defendant on the issue of liability as well as quantum. Agreed facts encl. 16 reads as follows:

(a) The defendant is and was at all material times a private limited company incorporated under the Companies Act 1965 and has its registered office at 62C Jalan SS21/62, Damansara Utama, 47400 Petaling Jaya, Selangor Darul Ehsan and its business address at Lot 98, Batu 1 1/2, Jalan Lipis, 27600, Raub, Pahang Darul Makmur.

(b) The plaintiff entered into a Purchase Order contract No. 51019001-1 dated 21.10.2005 (First Purchase Order) to purchase 4,277 pieces for the sum of USD115,479.00 from the defendant.

(c) The plaintiff entered into a Purchase Order contract No. 51019002-1 dated 9.1.2006 (Second Purchase Order) to purchase 4,244 sets for the sum of USD30,412.80 from the defendant.

(d) The material terms and conditions are contained in the First and Second Purchase Orders.

(e) The pieces and sets specified in the First and Second Purchase Orders were shipped at specific dates FOB Felixstowe England as specified therein.

[6] Issues to be tried encl. 15 reads as follows:

(a) Whether it is an implied term of the Purchase Order No. 51019001-1 dated 21.10.2005 (First Purchase Order) and Purchase Order No. 51019002-1 dated 9.1.2006 (Second Purchase Order) that the goods supplied by the defendant were of merchantable quality and/or fit for its purpose and/or free of defects after purportedly having gone through QC checks conducted by the plaintiff's representative?

A (b) Whether the goods supplied by the defendant under the 1st and 2nd Purchase Orders were defective and/or not of merchantable quality and/or not fit for its purpose after having purportedly gone through QC checks conducted by the plaintiff's representative?

B (c) Whether the plaintiff has suffered any loss or damage as a result of the defendant's alleged defective goods shipped under the 1st and/or 2nd Purchase Orders?

(d) Whether the defendant is liable to indemnify the plaintiff for any loss incurred as a result of the alleged defective goods C shipped under the First and/or Second Purchase Orders?

Preliminaries

[7] One witness gave evidence for the plaintiff and one for the D defendant. The plaintiff's evidence was consistent with the pleadings and contemporaneous documents and despite severe cross-examination the evidence was not shaken. The defendant's evidence was not consistent with the statement of defence and contemporaneous documents and was evasive to material issues on E liability and quantum despite admissions, and also admissions in the witness statement marked as WSDW1.

[8] I have heard the evidence, read the documents and submissions of the parties in detail. I am grateful to both learned counsel for detailed submissions on facts and law. I do not wish F to repeat the same save as to deal with the core issues. After having given much consideration to the submission of learned counsel for the defendant, I take the view that the plaintiff's claim must be allowed. My reasons *inter alia* are as follows:

G (a) The plaintiff's case is simple and straight forward and is well articulated in the plaintiff's witness statement marked as WSPW1. The goods were purchased subject to the terms and conditions contained in the plaintiff's purchase orders. The terms and conditions include the following:

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Clause 11:

The Seller hereby agrees to indemnify, keep indemnified and hold harmless the Buyer against all claims, liabilities, losses, damages, suits, costs and expenses including legal I costs and expenses on a full indemnity basis arising out of the breach or non-performance of any term, condition or warranty herein on the part of the Seller, including but not

limited to the sale to or use by third parties or ultimate consumers of goods including but not limited to any claim or action based upon breach of expression or implied warranty, strict liability or other liability arising from any defect in the goods including tortuous liability.

Clause 20:

It is hereby clearly understood and agreed that all and every claim due to faulty merchandise and or packing will be paid immediately by the Seller upon notice in writing by Atico Overseas Ltd.

Last term:

The Quality of merchandise purchased is hereby guaranteed by the Seller. The workmanship, quality, finish, style, size, weight and colours are hereby guaranteed by seller to be exactly as per the keep sample submitted to Atico Overseas Ltd.

I agree with the submission of learned counsel that the plaintiff has established their case according to law and the defendant is required to indemnify the plaintiff as per the terms and conditions of the purchase orders.

(b) In the instant case the plaintiff and defendant have agreed that the governing law to the purchase orders would be the law of Hong Kong, in particular the Sale of Goods Ordinance (Hong Kong Ordinance) which was tendered in court and marked as exh. P1. On the question of jurisdiction there are two issues which the court has to deal with, they are namely: (i) does this court has jurisdiction to interpret foreign law? (ii) has the Ordinance been sufficiently tendered and proved?

(c) I agree with the submission of learned counsel that on the factual matrix of the case this court has jurisdiction to hear this matter. Support for the proposition is found in a number of cases. To name a few are as follows:

(i) In *Kuwait Airways Corp (supra)* Lord Nicholls sitting in the House of Lords had this to say:

> The jurisprudence is founded on the recognition that in proceedings having connections with more than one country an issue brought before a court in one country may be more appropriately decided by reference to the laws of another country even though those laws are different from the law of the forum court. The laws of the other country may have adopted solutions, or even basic principles, rejected by the law of the forum country. These differences do not in themselves furnish reason why the forum court should decline to apply the foreign law.

(ii) The above proposition was adopted by the Federal Court in the recent case of *Government of India (supra)* where His Lordship Richard Malanjum CJSS made the following observations:

> Malaysian courts, like the English courts, can give effect to the agreement of parties to apply foreign law (being the choice of substantive law) as opposed to curial law unless perhaps where the application of the foreign law runs contrary to the sense of justice or decency.

(d) On the issue of proof of foreign law I agree with the submission of learned counsel for the plaintiff that foreign law can be adduced by directly adducing the foreign law ie, the Act or Ordinance as 'raw evidence'. Support for the proposition is found in ss. 38, 78(2), 84 and 86 of the Evidence Act 1950 and is elaborated below as follows:

(i) Section 38 of the Evidence Act 1950

> When the court has to form an opinion as to a law of any country, any statement of that law contained in a book purporting to be printed or published under the authority of the Government of that country, and to contain any such law, and any report of a ruling of the courts of that country contained in a book purporting to be a report of such rulings, is relevant.

This section is self-explanatory. Under this section the court may refer to foreign law. However the book or report it refers to must be an authoritative one printed and published by the government (see *In The Goods of Goh Siew Swee, deceased, Goh Tat Eng v. Goh Eng Loon* [1911] 12

SSLR 18). There seems to be an exception in the case of law reports, which may be published either officially or privately.

Section 38 and s. 45 of the Act were considered in the case of *Mak Sik Kwong v. Minister of Home Affairs, Malaysia (No. 2)* [1975] 1 LNS 97 Abdoolcader J (as His Lordship then was) observed:

> Secondly, foreign law on a particular topic is a question of fact. An opinion upon a point of foreign law can be proved by evidence of experts (section 45(1) Evidence Act) and in this connection statements as to any law of any foreign country contained in law books, printed or published under the authority of the Government of that foreign country, are relevant (section 38 Evidence Act).

(ii) Section 78(2) of the Evidence Act 1950

> Copies of Acts, Ordinances and Statutes passed by the legislature of any part of the Commonwealth and of orders, regulations and other instruments issued or made under the authority of any such Act, Ordinance or Statute, if purporting to be printed by the Government Printer, shall be received in evidence by all courts in Malaysia without any proof being given that the copies were so printed.

This section prescribes certain special modes of proving the contents of various kinds of official documents. The modes prescribed in this section are not exhaustive. In *Kaljiban Bhattacherjee* Cr. LJ 775 it was stated that the mode of proof of public documents mentioned in s. 78 is permissive and the court is not precluded from having recourse to other modes of proof.

(iii) Section 84 of the Evidence Act 1950

> The court shall presume the genuineness of every book purporting:
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> (a) to be printed or published under the authority of the Government of any country and to contain any of the laws of that country; or
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> (b) to contain reports of decisions of the courts of that country.

A This section may be read with s. 38, which makes relevant statements as to any law and rulings of courts contained in any officially printed books of any country. Under this section the proof of genuineness of authorised books of any country containing laws and reports of decision of
B courts is dispensed with. Under this section the court presumes the genuineness of every book purported to be printed or published under the authority of the government of any country, and which contains any of the laws of that country.

C (iv) Section 86 of the Evidence Act 1950

> The court may presume that any document purporting to be a certified copy of any judicial record of any country not being a part of the Commonwealth is
> D genuine and accurate if the document purports to be certified in any manner which is certified by any representative of the Yang di-Pertuan Agong in or for such country to be the manner commonly in use in that country for the certification of copies of judicial records.

E Under this section as opposed to previous sections the word 'may' is used instead of 'shall'. Thus, it will appear that the presumption here is left to the discretion of the court. This section must be read with s. 78(6). Under this
F section the court may presume the genuineness and accuracy of the certified copy of any judicial record of any foreign country other than the commonwealth country, if such copy is duly certified according to the rules of that country and fulfill the condition set out in s. 78(6).

G (e) In a recent case the Singapore Court of Appeal in *Pacific Recreation Pte Ltd (supra)* looked at similar sections in Singapore which are *para materia* to the Evidence Act 1950 and took the view that the legal Acts etc,; could be admitted as 'raw evidence'. The court *inter alia* on the facts of the case
H held as follows:

> (13) Certain raw sources of foreign law could be adduced despite their not having been part of a foreign law expert's evidence, provided they satisfied the requirements in the Evidence Act (Cap 97, 1997 Rev Ed). However, even if raw sources of
> I foreign law were admissible, it did not mean that the courts

were obliged to accord those sources any evidentiary weight. It was preferable that solicitors provided expert opinion on foreign law whenever possible: at [55] and [60].

(18) The function of the expert witness on foreign law was: (a) to inform the court of the relevant contents of the foreign law, identifying statutes or other legislation and explaining where necessary the foreign court's approach to their construction; (b) to identify judgments or other authorities, explaining what status they had as sources of the foreign law; and (c) where there was no authority directly in point, to assist the court in making a finding as to what the foreign court's ruling would be if the issue was to arise for decision there: at [76].

(19) The purpose of procuring expert evidence was not merely to place the content of foreign law before the court, but also to obtain the expert's opinion as to such law's effect. Where the law was not settled in the foreign jurisdiction, the expert's duty was more extensive and far-reaching. The expert should then give his opinion as to the likely decision of a foreign court. The expert could not merely present his conclusion on what the foreign law was without also presenting the underlying evidence and the analytical process by which he reached his conclusion: at [78], [82] and [85].

(f) I do not find any merit in the defendant's case. The issues to be tried is found in favour of the plaintiff and I agree with the submission of learned counsel for the plaintiff that its claim should be allowed and judgment be entered against the defendant *inter alia* due to the following reasons:

(i) There was a sale and purchase of the said goods via the said purchase orders. This is not in dispute;

(ii) The said purchase orders' terms and conditions clearly spelt out, *inter alia*, the defendant's obligation to indemnify the plaintiff from claims from 3rd parties. This was acknowledged by the defendant on the said purchase orders;

(iii) The said goods were defective. Again, this issue cannot be disputed as the photographs show as much and the defendant has failed to rebut the same whether at the material time or at trial;

A (iv) There were both express and implied terms that the goods must be of merchantable quality. As the said goods were defective, the defendant has breached this term and is liable to compensate the plaintiff;

B (v) The plaintiff had to destroy the said goods as the defendant had never responded to the plaintiff's queries as to what the defendant wanted to do with the said goods. Again, the defendant has failed to rebut the same whether at the material time or at the trial of this matter;

C (vi) The plaintiff had to compensate Wilkinsons for the defective goods. This is clearly borne out in the documents; and

(vii) The defendant has admitted that it is liable for the D defective goods. This is clear from the correspondence between the defendant and the plaintiff wherein the defendant had offered to compensate the plaintiff.

[9] For reasons stated above, I take the view that the plaintiff's E claim prayer (a) is allowed with interest at 4% per annum from the date of filing to the date of judgment and at 4% per annum from the date of judgment to the date of realisation with costs in the sum of RM10,000 to be paid by defendant to the plaintiff. The plaintiff to pay the allocatur fee before extraction of order for F costs. The deputy registrar to issue certificate for the allocatur.

I hereby order so.

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